KFH Sjarah House (M) Sdn Bhd v Lembaga Kemajuan Wilayah Pulau Pinang

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–736 OF 2008
CHEW SOO HO JC
15 JULY 2011

Tort — Conversion — Wrongful sale — Lessor's goods kept in premises rented by lessee — Landlord retook possession of premises on lessee's failure to pay rent — Lessee defaulted under lease agreement — Lessor's requests to enter premises to take back goods not heeded by landlord — Writ of seizure and sale filed by landlord — Lessor's goods seized and auctioned by court bailiff — Whether landlord's act of conversion over lessor's goods deliberate — Whether market value of goods at date of conversion proper measure of damages

The plaintiff, a licensed leasing company, had leased 11 units of machines ('the machines') to a company ('Hexafuji') which had kept the machines in premises ('the premises') it rented from the defendant. Hexafuji defaulted in payment of rental to the defendant and in its lease payments to the plaintiff. The defendant retook possession of the premises with the machines still within it. When the plaintiff asked the defendant permission to enter the premises to remove the machines it was asked to wait until the defendant's board of directors had discussed the matter. Thereafter, there was no response whatsoever from the defendant despite several letters to it from the plaintiff and its solicitors over the matter. Finally, after several months of *impasse*, a representative of the plaintiff was allowed to enter the premises, in the presence of the defendant's representatives, to inspect and tag those machines over which the plaintiff claimed ownership. Meanwhile, pursuant to a writ of seizure and sale the defendant had filed in the sessions court, the bailiff of the court seized all machines in the premises, including the plaintiff's machines, to be auctioned. The defendant informed the plaintiff of the seizure and auction only four days before the auction date. Through its solicitor, the plaintiff promptly sent a notice of claim via courier to be filed in court and notified the defendant's solicitors of same. However, on the auction date, the plaintiff and its solicitor were unable to stop the auction of the machines despite informing the bailiff and the court registrar of their claim and asking for a postponement of the auction. The machines were auctioned off for RM160,000. The plaintiff brought the instant action against the defendant principally for the tort of conversion and claimed RM600,000, which it alleged was the market value of the machines, in damages. The plaintiff said the defendant had wrongfully auctioned the machines despite knowing of the plaintiff's ownership claim. The defendant's main contention was that (i) because the plaintiff did not

provide them with the serial numbers of the claimed machines, the machines could not be positively identified before the auction (ii) the plaintiff failed to act expeditiously to take out an interpleader summons to claim the machines within reasonable time and (iii) the sum claimed by the plaintiff was incorrect and excessive and did not take into account depreciation of the machines.

Held, allowing the claim with costs:

(1) The defendant's intent to interfere with the plaintiff's right over the machines was manifest and its act to commit conversion was deliberate. The defendant could have avoided this suit by deferring the auction of the machines claimed by the plaintiff and waited for the disposal of the interpleader proceeding, but they chose to act to their detriment (see para 7).

(2) The plaintiff had provided the defendant sufficient documents and facts that some of the machines housed in the premises belonged to it. The defendant was sufficiently put to notice that it ought not to interfere with the plaintiff's rights over those machines. The defendant ought to have taken steps to verify the plaintiff's claim of ownership with Hexafuji. It had a duty to exercise reasonable care to ascertain who the true owner was before proceeding with the auction (see para 15).

(3) As the defendant had received sufficient notice of the probable ownership of the machines claimed, the onus was on them to ensure they did not wrongfully retain the property of the true owner or wrongfully auction the machines. If the defendant was in doubt and yet proceeded to dispose of property belonging to others, there was no defence even if it pleaded innocence or good faith (see para 15).

(4) The defendant's assertion of the inaccuracy and/or excessiveness of the market value of the machines arrived at by the registered valuer ('SP7') was bare and had no value. The defendant should have obtained a separate report or led evidence from another registered valuer or qualified person to say so (see para 26).

[Bahasa Malaysia summary

Plaintif, syarikat pinjaman berlesan, telah menyewakan 11 unit mesin ('mesin') kepada syarikat ('Hexafuji') yang telah menyimpan mesin tersebut di premis ('premis') yang disewa daripada defendan. Hexafuji mengingkari bayaran sewa kepada defendan dan dalam bayaran pajakannya kepada plaintif. Defendan mengambil semula milikan premis dengan mesin masih berada di dalamnya. Apabila plaintif meminta izin daripada defendan untuk memasuki premis tersebut untuk mengambil mesin, ia disuruh menunggu sehingga lembaga pengarah defendan berunding perkara tersebut. Kemudiannya, tidak terdapat apa-apa respons daripada defendan walaupun terdapat beberapa surat kepadanya daripada plaintif dan peguamnya atas perkara tersebut. Akhirnya,

selepas beberapa bulan mengalami jalan buntu, wakil plaintif dibenarkan memasuki premis tersebut, dalam kehadiran wakil defendan, untuk memeriksa dan menandakan mesin yang mana plaintif menuntut milikan. Sementara itu, berikutan writ perampasan dan jualan yang difailkan oleh defendan di mahkamah sesyen, bailif mahkamah merampas kesemua mesin tersebut di premis tersebut, termasuk mesin plaintif, untuk dilelong. Defendan memberitahu plaintif mengenai perampasan tersebut dan lelongan hanya empat hari sebelum tarikh lelong. Melalui peguamnya, plaintif secara segera menghantar notis tuntutan melalui kiriman cepat untuk difailkan di Mahkamah dan memberitahu peguam defendan mengenainya. Walau bagaimanapun, pada tarikh lelongan, plaintif dan peguamnya tidak dapat menyekat lelongan mesin walaupun telah memberitahu bailif dan pendaftar mahkamah mengenai tuntutan mereka dan memohon untuk penangguhan lelongan tersebut. Mesin tersebut dilelongkan untuk sejumlah RM160,000. Plaintif membawa tindakan ini terhadap defendan terutamanya untuk tort konversi dan menuntut RM600,000, yang mana ia dakwa nilai pasaran mesin tersebut, dalam ganti rugi. Plaintif menyatakan defendan telah secara salah melelong mesin tersebut walaupun mengetahui mengenai tuntutan milikan plaintif. Hujahan utama defendan adalah bahawa (i) kerana plaintif tidak memberikan mereka nombor-nombor siri mesin yang dituntut tersebut, mesin tidak dapat dikenal pasti sebelum lelongan tersebut (ii) plaintif gagal untuk bertindak dengan cepat dan cekap untuk memfailkan saman interplider untuk menuntut mesin tersebut dalam masa yang munasabah dan (iii) jumlah yang dituntut oleh plaintif adalah salah dan berlebihan dan tidak mengambil kira susut nilai mesin tersebut.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Niat defendan untuk campur tangan dengan hak plaintif ke atas mesin tersebut adalah jelas dan tindakannya untuk melakukan konversi adalah sengaja. Defendan boleh mengelak tindakan ini dengan menangguhkan lelongan mesin yang dituntut oleh plaintif dan menunggu untuk pendengaran prosiding interplider, tetapi mereka memilih untuk bertindak sehingga menjejaskan (lihat perenggan 17).

(2) Plaintif telah mengemukakan kepada defendan dokumen-dokumen yang mencukupi dan fakta bahawa sebahagian daripada mesin yang diletakkan di premis tersebut adalah miliknya. Defendan telah diberi notis secukupnya bahawa ia tidak patut campur tangan dengan hak plaintif ke atas mesin tersebut. Defendan patut mengambil langkah untuk mengesahkan tuntutan milikan plaintif kepada Hexafuji. Ia mempunyai duti untuk melaksanakan penjagaan yang munasabah untuk memastikan siapakah tuan punya sebenar sebelum meneruskan dengan lelongan tersebut (lihat perenggan 15).

(3) Memandangkan defendan telah menerima notis yang mencukupi

mengenai pemilikan kemungkinan terhadap mesin yang dituntut, beban adalah ke atas mereka untuk memastikan mereka tidak secara salah menahan harta pemilik sebenar atau secara salah melelong mesin tersebut. Jika defendan berasa sangsi tetapi meneruskan dengan menjual harta milikan orang lain, tidak terdapat pembelaan walaupun ia memplid tidak tahu apa-apa atau suci hati (lihat perenggan 15).

(4) Penegasan defendan mengenai ketidaktepatan dan/atau nilai pasaran mesin yang berlebihan yang dinilai ole penilai berdaftar ('SP7') adalah kosong dan tidak mempunyai nilai. Defendan patut mendapatkan laporan berasingan atau mendapatkan keterangan daripada penilai berdaftar yang lain atau orang berkelayakan untuk memberikan keterangan (lihat perenggan 26).]

Notes

For cases on wrongful sale, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 180–182.

Cases referred to

BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd and others [1991] 2 All ER 129, PC (refd)

Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal [2010] 3 MLJ 509, CA (refd)

Emko Properties Sdn Bhd v Lee Choong Kheng [1996] MLJU 515; [1997] 2 CLJ Supp 133, HC (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)

Marfani & Co Ltd v Midland Bank Ltd [1968] 1 WLR 956, CA (refd)

PP v Abdul Rahim bin Abdul Satar [1990] 3 MLJ 188; [1990] 3 CLJ (Rep) 1, HC (refd)

Rimba Muda Timber Trading v Lim Kuoh Wee [2006] 4 MLJ 505, FC (refd)

Sanderson v Marsden and Jones (1922) 10 LI L Rep 467, CA (refd)

Sim Ah Song v Rex [1951] MLJ 150 (refd)

Soon Peng Yam & Anor v Bank of Tokyo - Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31, CA (refd)

Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun [1981] 1 MLJ 201, FC (refd)

Williams v Peel River Land and Mineral Co Ltd (1886) 55 LT 689, CA (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Evidence Act 1950 s 51

N Sivagurunanthan (Shamiah KE Ng & Siva) for the plaintiff.
Azhar bin Ahmad (Aswar, Simon & Azhar) for the defendant.

Chew Soo Ho JC:

FACTUAL MATRIX

[1] The plaintff is a licensed leasing company while the defendant is a body corporate and the landlord of premfises Nos 10 and 12, Lorong IKS Bukit Minyak 1, IKS Bukit Minyak PERDA 2, 14000 Bukit Mertajam, Seberang Prai, Pulau Pinang ('the said premises') which was let to a company known as Hexafuji Sdn Bhd ('Hexafuji'), the tenant.

[2] Pursuant to leasing agreements dated 28 June 1999, 22 July 1999, 25 January 2000, 18 November 2003 and 2 January 2004 between the plaintiff and Hexafuji, the plaintiff had leased, inter alia, 11 units of machines, the subject matter of this suit, to Hexafuji comprising of precision thread rolling machine (1 unit), vertical drilling machine (3 units), slotting machine, precision bench lathe machine (1 unit), auto vertical drilling machine (1 unit) and Takisawa CNC lathe machine (3 units) which were received and kept in the said premises by Hexafuji.

[3] Upon Hexafuji's default in payments of rental of the premises to the defendant, the defendant had regained possession of the said premises together with the machines that were leased to Hexafuji by the plaintiff located therein. Hexafuji had at the material time also defaulted in its payments to the plaintiff pursuant to the aforesaid leasing agreements which entitled the plaintiff as leasor to immediate possession of the aforesaid machines under the said agreements. Vide its letter dated 25 April 2007, the plaintiff wrote to give notice to the defendant claiming ownership of 17 items of machine initially which included the above 11 units claimed and expressing its intention to take possession of the machines. The plaintiff requested the cooperation of the defendant to allow the plaintiff to enter the said premises. The defendant's solicitors then replied vide their letter dated 3 May 2007 requesting the plaintiff to defer its intention to repossess the machines so as to enable the defendant to discuss the matter by its board of directors and to avert any legal complication that might have arisen between the defendant and Hexafuji. Subsequent to this, there was no further response from the defendant. The plaintiff then instructed its solicitors to write to the defendant and the defendant's solicitors. In spite of the plaintiff's solicitors having written several letters to the defendant and/or the defendant's solicitors dated 17 July 2007, 9 August 2007, 4 September 2007, 24 September 2007, 10 December 2007 and 19 December 2007, there was no reply nor consent being given to the plaintiff to recover its machinery.

[4] On 7 January 2008 and 22 January 2008, the plaintiff's assistant general

manager (legal and enforcement) ('SP1') visited the said premises and was permitted to enter the said premises to inspect the machinery in the presence of the defendant's representative ('SD1/SD2') and/or the defendant's solicitor ('SD3'). On 22 January 2008, SP1 was allowed to tag or label the machines which the plaintiff claimed ownership.

[5] The defendant meanwhile had vide its letter dated 11 January 2008 to the plaintiff scheduled a meeting on 20 February 2008 which would be chaired by its general manager. However, pursuant to a writ of seizure and sale filed by the defendant on 15 January 2008, all the machines with the plaintiff's machines inclusive in the said premises were seized by the bailiff of the sessions court and auction was fixed on 18 February 2008. As a consequence, the defendant vide its letter dated February 2008 informed the plaintiff that the initial meeting scheduled on 20 February 2008 was to be brought forward to 14 February 2008. The meeting was duly held and in this meeting, the defendant informed the plaintiff of the said seizure by the bailiff pursuant to the defendant's writ of seizure and sale and the auction date for the machines seized to be on 18 February 2008. The plaintiff then through its solicitors filed a notice of claim (Form 29) via courier service at Butterworth Sessions Court and a letter dated 15 February 2008 (Friday) was also sent to the defendant's then solicitors. The plaintiff's solicitor (SP6) was also present at the said premises on 18 February 2008 (Monday) and had spoken to the bailiff and the Registrar of the Sessions Court; she informed them of the ownership claim of the machines by the plaintiff and requested for a postponement of the auction as the plaintiff had filed the notice in Form 29. However, the plaintiff and its solicitor could not stop the auction possibly because Form 29 sent via courier service from Kuala Lumpur had not reached the court or that because the defendant did not agree to postpone it.

[6] The plaintiff contended that the defendant having had full knowledge of the ownership claim of the machines leased to Hexafuji by the plaintiff, had however wrongfully auctioned the said machines resulting in losses to the plaintiff. The plaintiff thus claimed that the defendant had committed conversion and the sum of RM600,000 being the market value of the said machines was claimed as damages.

[7] The defendant's principle defence is that the plaintiff was unable to positively identify the machines in the said premises as there was no serial numbers of the machines claimed being disclosed before the auction and the plaintiff had failed to act immediately and/or take out interpleader to claim the machines within reasonable time. The defendant also contended that the sum claimed by the plaintiff is incorrect and excessive without taking into account

the depreciation value of the machines.

THE ISSUES

[8] The issues raised by parties to be triable are as follows:

(a) whether the plaintiff had proved on a balance of probabilities that they are the owner of the 11 machines as claimed;

(b) whether the plaintiff had given sufficient evidence/particulars of its ownership of the machines to the defendant at the material time when the machines were in the said premises under the control and in the possession of the defendant and/or whether the plaintiff had alerted the defendant sufficiently of their ownership of the machines which required the defendant to make enquiries and confirm the same before proceeding with the seizure and the ultimate auction;

(c) whether the defendant had in the circumstances of the case the intention to act wrongfully by detaining the said machines and dealing with them in a manner inconsistent with the plaintiff's rights by conversion through the act of auctioning off the machines; and

(d) whether the plaintiff had proved that they are entitled to claim the market value of the machines at the date of the conversion in the sum of RM600,000 and other damages.

EVALUATION AND FINDINGS

First issue: Ownership of the 11 machines claimed by the plaintiff

[9] The plaintiff's case as pleaded is premised on the tort of trespass and/or conversion. The difference of these two is well stated by Atkin LJ in *Sanderson v Marsden and Jones* (1922) 10 LI L Rep 467 at p 472 as follows:

> An act of conversion differs from mere trespass inasmuch as the former must amount to a deprivation of possession to such an extent as to be inconsistent with the right of the owner and evidence of an intention to deprive him of that right, whereas the latter includes every direct forcible injury or act disturbing the possession of the owner, however slight the act may be.

[10] The factual matrix of the case as well as the submissions by both parties herein show that this is more of a case of the tort of conversion and not the mere act of disturbing the possession of the owner as in a case of trespass as the machines in this case allegedly belonging to the plaintiff under leasing agreements with Hexafuji as lessee were not only retained by the defendant when the defendant regained possession of the said premises tenanted to

Hexafuji but also were seized and sold in an auction conducted by the bailiff of court upon a writ of seizure and sale taken out by the defendant; hence the plaintiff had been deprived of the said machines by the act of the defendant which was inconsistent with the right of the plaintiff if the plaintiff can prove its ownership of the said machines. In order to assert the right of the owner, the plaintiff must necessarily prove that they are true owner of those machines which the defendant had acted inconsistently with that right. A proof of the right of mere possession of the goods by the plaintiff would not suffice to constitute and sustain a claim under the tort of conversion: *Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509 where our Court of Appeal seems to depart from the English common law position; see *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956. If the ownership is not proved, there is no question of deprivation inconsistent with the right of the owner. Similarly, as held by the Federal Court in *Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201, if the goods which are an important element of the tort of conversion were not proved to have existed, a defendant could not be said to have moved them and converted them to his use.

[11] To prove its ownership of the 11 machines claimed, the plaintiff had produced five leasing agreements respectively dated as above-mentioned between the plaintiff as the leasor and Hexafuji as the lessee. These five leasing agreements are annexed in bundle C pp 1–87. From the first leasing agreement dated 28 June 1999 (bundle C pp 1–15 at p 11) the description of the leased machinery includes three units of 'Vertical Drilling Machine Model: ZX -32A8 and 1 unit of Thread Rolling Model: JDY-30' which are similar in name and model of the first four items of machine vide para 4(a)–(d) of the statement of claim (bundle A tab 1 pp 4–5) but without the serial or machine numbers as pleaded. In the second leasing agreements dated 22 July 1999 (bundle C pp 16–30 at p 26), the description of the machinery includes one unit of 'Slotting Machine Model: B 5020', two units of 'Precision Bench Lathe Model: YJ - 25' and two units of 'Auto Vertical Drilling Machine Model: H5–32A'. The plaintiff's claim vide para 4(e), (f) and (g) of the statement of claim appears to bear the same name and model of the machines except that no serial numbers were stated in the leasing agreement; the quantity of the machines claimed by the plaintiff is one unit each whereas there are two units of 'Precision Bench Lathe' and two units of 'Auto Vertical Drilling Machine' that were leased to Hexafuji vide this second leasing agreement. The third leasing agreement dated 25 January 2000 (bundle C pp 31–46) with a supplementary agreement (bundle C pp 48–50) which leased four items of machinery/equipment, are not related to the machines claimed by the plaintiff and is thus irrelevant. The fourth leasing agreement dated 18 November 2003 (bundle C pp 51–69) involves one unit of 'Takisawa CNC Lathe Machine Model: TC - 200 T8 L3 with Fanuc 2I ITB Control'. The plaintiff's claim vide para 4(k) of the statement of claim depicts the machine to be 'Takisawa CNC Machine with

Fanuc 21 ITB L3 Model TC -200T Serial/Mach. No. TBFM 2653'. There is slight variance as 'ITB' was written as 'ITB' and the figure '8' is missing in the model of the machine claimed vide the statement of claim. There was no serial or machine number noted in this leasing agreement. In the fifth leasing agreement dated 2 January 2004 (bundle C pp 70–87), the machinery/equipment leased is one unit of 'Takisawa CNC Lathe Machine Model: TC - 200 T8 L6 with Fanuc 2I ITB Control'. However, the other three units of 'Takisawa CNC Lathe Machine' as pleaded in para 4(h), (i) and (j) do not carry the exact model as described in this leasing agreement as 'T8 L6' was omitted. Similarly, in this leasing agreement, the serial or machine number was also not stated. However, vide the plaintiff's reply to defence in bundle A tab 3 pp 3–4, the plaintiff had stated the respective invoice number, L/C number, serial numbers of the machines claimed etc pursuant to the leasing agreements above-mentioned, which had been enclosed in bundle D pp 1–33 with the original or the plaintiff's copies being produced by SP1, its then assistant general manager, and had been marked as exh P12. Exhibit P12 comprises of purchase order from plaintiff to the supplier, delivery order and registration to Hexafuji, acknowledgement receipt of the machines by Hexafuji, payment voucher showing payment made by the plaintiff to the supplier with their endorsement of receipt, inter alia. Pertaining to the four units of Takisawa CNC Lathe Machines, SP1 explained that the purchase orders were issued directly to Takisawa Machine Tool Co Ltd in Japan which had appointed a forwarding agent to deliver the four units of the machines to Hexafuji. The Delivery Order No 1917 for Purchase Order No 2029 dated 20 October 2003 and Delivery Order No 1918 for Purchase Order No 2030 dated 20 October 2003 showed that one unit of Takisawa CNC Lathe Model TC - 200 T8 L3 with Fanuc 21 iTB Control and one unit of Takisawa CNC Lathe Model TC - 200 T8 L6 with Fanuc 21 iTB Control were delivered and received by Hexafuji with their acknowledgement on 21 October 2003. There is a Purchase Order No 2087 dated 23 December 2003 for one unit of Takisawa CNC Lathe Model TC - 200 T8 L6 with Fanuc 21 iTB Control Machine but no delivery order and acknowledgement receipt was tendered. The plaintiff alleged that some of these documents were missing. The plaintiff had produced the packing list of Takisawa Machine Tool Co Ltd of Japan which showed that four units of the machines consigned to the plaintiff were to be shipped to Port Kelang from Kobe, Japan. The date of this packing list was stated as 24 January 2003 and the sailing date of the shipment was on or about 30 January 2003 while the certificate of origin was dated 24 January 2003 and the bill of lading for the said four units of Takisawa machines was dated 30 January 2003 with the goods laden on board the vessel. However, from these documents, its appears that four units of Takisawa CNC Lathe Machines were to be shipped from Japan to Port Kelang vide packing list and certificate of origin dated 24 January 2003 and bill of lading dated 30 January 2003 which to this court, must necessarily mean that the plaintiff must have given its purchase order for these four units to Takisawa Machine Tool Co Ltd of Japan earlier than 24

A January 2003. However, looking at the Purchase Order Nos 2029, 2030 and 2087, they were dated 20 October 2003 (PO 2029), 20 October 2003 (PO 2030) and 23 December 2003 (PO 2087) which were well after the shipment of the four units vide the packing list and the bill of lading that were dated in January 2003. Therefore, the Purchase Order Nos 2029, 2030 and 2087 could B not have been the purchase oder for the four units which the plaintiff had purchased referring to the said packing list, certificate of origin and bill of lading. Discerning from these documents, I can only conclude upon a finding of facts that there could be more than four units of the Takisawa Machines ie four units probably in January 2003 and three more units in October and C December 2003 since there is no evidence or explanation whether the later three units were the same from the earlier four units nor any explanation on the disparity in term of the time ie four units that were packed and shipped in January 2003 while the later three units were purchased and delivered in October and December 2003. In the circumstances, it is incumbent upon the D plaintiff to prove that the Takisawa Machines in the said premises of the defendant were the machines purchased and leased to Hexafuji since the models, as they appeared in the documents, could not be the determining factor that those machines were the ones leased to Hexafuji. In a case where the model cannot solely determine the identity of the machines, I tend to agree E with the defendant's contention that the serial numbers or the machine numbers of the machines would therefore be the positive means to identify the plaintiff's alleged four units of Takisawa machines that were purchased and leased to Hexafuji. SP1 said in his witness statement (P1 Q & A 100) that Takisawa Machine Tool Co Ltd of Japan had vide letter dated 13 March 2009 F (bundle D p 174) confirmed the serial numbers of three units of Takisawa CNC Lathe Model TC - 200 T8 L6 machines to be TBFZ 3380, TBFZ 3381 and TBFZ 3382 and one unit of Takisawa CNC Lathe Model TC - 200 T8 L3 to bear serial No TBFM 2653. However, this information was obtained only in March 2009 more than a year after the seizure and sale. It is thus more probable G that SP1 was unable to produce the serial numbers of these four units of Takisawa machines to the defendant to prove the plaintiff's ownership bearing in mind that there could be numerous units of the same model. Although SP1's evidence does not seem to establish the actual ownership of the four units of Takisawa machines, the plaintiff had nevertheless called the former director of H Hexafuji ('SP4') who confirmed that the four units of Takisawa machines which bear Machine Nos TBFZ 3380, TBFZ 3381, TBFZ 3382 and TBFM 2653 were among all the 11 units of machinery leased to Hexafuji by the plaintff pursuant to the aforesaid leasing agreements. These four units of Takisawa machines with the said machine Nos TBFZ 3380, 3381 and 3382 I and TBFM 2653 were also confirmed by SP4 to be kept in the said premises. These four machines as can be seen in the photographs taken on the date of the auction were among the machinery and/or equipment in the said premises on the date of the auction. Machine No TBFZ 3380 can be seen in photograph in bundle D p 54; machine No TBFZ 3381 in bundle D pp 61–62; Machine No

TBFZ 3382 in bundle D p 63 and Machine No TBFM in bundle D pp 56–58. SP1 might probably not know the serial or machine number of these four units of Takisawa machines at the material time but SP4 being the Director of Hexafuji which had physically received the machines into its premises would certainly have known the model and serial or machine numbers as they were clearly visible on the machines. I find it probable for SP4 to be able to testify as to the fact of the machine numbers particularly in respect of these four Takisawa machines which Hexafuji was the receipient and was in actual possession since the machines were leased by the plaintiff to Hexafuji. Though the defence had been challenging or contending the issue of serial or machine numbers, ironically this important and material aspect of the evidence of SP4 in relation to the various serial or machine numbers as testified by him vide his witness statement P7 Q & A.5 was not challenged in cross-examination; hence it must be treated as an acceptance of this aspect of his evidence on the defence's failure to do so; see *Soon Peng Yam & Anor v Bank of Tokyo - Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 at p 36 (CA); *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC). Thus, taking into consideration the evidence of SP4 which is substantiated by the fact of the physical existence of the four units of Takisawa machine bearing the aforesaid machine numbers in the said premises on the date of auction and the letter of confirmation of the serial numbers of all the four units of Takisawa machiness by the manufacturer vide bundle D p174, I am satisfied upon a finding of fact that these four units of Takisawa machines in the said premises of the defendant seized and auctioned pursuant to the defendant's writ of seizure and sale were the plaintiff's actual property which were leased to Hexafuji pursuant to the aforesaid relevant leasing agreements. I accept the plaintiff's explanation as to why the serial or machine numbers were not stated in the said leasing agreements because these numbers were only available when the machines were to be dispatched and delivered.

[12] Reverting to the other seven of the 11 machines that the plaintiff claimed, the plaintiff relied on the purchase orders, delivery orders and registration with acknowledgement receipts, payment vouchers showing the plaintiff's payment made to the suppliers to prove its ownership of the seven machines. However, from the bundle of original documents marked as exh P12, only three delivery orders with the serial or machine number of three units of the machines out of the seven units claimed by the plaintiff were produced. They are the items in para 4(e), (f) and (g) in the statement of claim vide delivery order dated 16 July 1999 for Invoice No 3649, delivery order dated 28 August 1999 for Invoice No 3734 and delivery order dated 23 September 1999 for Invoice No 3800. Defence seems to concede in submission on these three items to have been so proved. I do not doubt these documentary proof which speaks for itself and am satisfied that the plaintiff had duly proved these three units of machine as itemised in para 4(e), (f) and (g) in the statement of claim. Pertaining to the remaining four machines listed

in para 4(a)–(d) in the statement of claim, although the plaintiff was unable to produce the invoices and the purchase orders which bear the respective serial or machine numbers, the unchallenged evidence of SP4 vide Q & A.5 in his witness statement (P7) had duly provided the respective type of machine, its model and serial/machine number. SP4 being the director of Hexafuji who was the recipient of the said machines, would certainly be able to verify and confirm the machines leased to them bearing in mind that Hexafuji had been in physical possession of these machines until the defendant regained possession of the said premises and the detail particulars of the machines such as the serial/machine numbers which were exhibited on the respective machines must be known to Hexafuji. Evaluating the evidence of SP4 coupled with the original documents produced as exh P12,1 find that on a balance of probabilities that the plaintiff had also proved that the four machines in para 4(a)–(d) in the statement of claim were the plaintiff's machines leased to Hexafuji pursuant to the relevant leasing agreements above-mentioned.

[13] Having considered all the evidence relating to this issue, I hold on a balance of probabilities that the plaintiff had proved their actual ownership of the 11 machines as claimed.

Second issue: Whether the defendant had been provided and/or alerted by the plaintiff with sufficient evidence of the plaintiff's machines at the material time on or before the auction which necessitated the defendant to enquire and confirm before its decision to proceed with the ultimate auction; and

Third issue: Whether the defendant had wrongfully detained the machines and dealt with them in a manner inconsistent with the plaintiff's rights by auction

[14] These two issues are considered together on the flow of the events in this case as they are closely linked.

[15] Evidence of SP1 shows that he had provided the relevant documents and the serial numbers of the machines (except the serial/machines numbers of four units of Takisawa machines) to the defendant's representatives particularly on his first visit to the said premises on 7 January 2008 and second visit on 22 January 2008 when SP1 had furnished the leasing agreements to Encik Rosman bin Hj Hashim, the defendant's technical and property manager. He also identified the machines through the invoices with serial/machine numbers that he brought along on 22 January 2008 and tagged the machines accordingly with the plaintiff's stickers and had also shown these documents to the defendant's representatives during this second visit. SD2 and SD3 also confirmed that SP1 had tagged all the machines. Photographs in bundle D pp 50, 60, 76, 83, 87, 88, 102, 105, 123 and 128 taken by SP3 on the date of

the auction ie 18 February 2008 show that the plaintiff's tagging stickers were still on these machines. From the correspondence of the plaintiff and their solicitors to the defendant or the defendant's solicitors as can be seen in bundle C pp 88–134 (except pp 118–123 and 129), there had been notices given to the defendant of the plaintiff's claim of ownership of the machines as listed out in the respective annexures. The annexure of plaintiff's letter dated 28 January 2008 to the defendant (bundle C pp 124–125 and 128) had provided the serial numbers of the seven machines out of the 11 units claimed but not the four units of Takisawa machines. Defence through DW1 had denied particularly that the plaintiff had shown them the serial numbers of the machines or related documents to prove the plaintiff's ownership of these machines claimed. However SD3, the defendant's then solicitor, had stated in cross-examination that there was a meeting on 14 February 2008 (scheduled by the defendant vide its letter dated February 2008 — bundle C p 129) and that the plaintiff's representative had shown the documents to the defendant's representatives although he said that no serial numbers of the machines were presented. However, SD3 endorsed that if Hexafuji was able to confirm the machines to be owned by the plaintiff, then there would be no legal complication. From the evidence as a whole, both oral and documentary, I find that there is sufficient documents and facts provided by the plaintiff to the defendant that some of the machines housed in the said premises where Hexafuji was occupying as tenant could probably be belonging to the plaintiff which has sufficiently put the defendant to notice that defendant ought not to have interfered with the plaintiff's right over those machines and that the defendant ought to have taken steps to make enquiry which they could have easily done so from Hexafuji to confirm the plaintiff's claim of ownership. I am of the view that when the defendant had been given sufficient notice of the probable ownership of the machines claimed, the onus is on them to ensure that they do not wrongfully retain the property of the true owner or wrongfully sold or pass good title to the buyer or as in this case, wrongfully auction the machines belonging to the plaintiff which is inconsistent with the right of the plaintiff or which constitutes an interference of the plaintiff's right. By 'wrongfully', *Clerk & Lindsell on Torts* (18th Ed), at p 730 at para 14.10 defines it to mean 'without the actual permission of the owner' in cases of conversion. The defendant would be acting at their risk if they shut their eyes on such claim or notices by the plaintiff when they proceeded to auction off the property as in this case. This tangible risk is in the event it is ultimately found that the plaintiff was the true owner of the said machines, then the defendant would be guilty of the tort of conversion or trespass since they were fully appraised of the plaintiff's claim. I would agree with SD3 that if Hexafuji being the actual possessor or end user was able to confirm the ownership of the machines to be belonging to the plaintiff, there would probably be no legal complication. Most unfortunately, SD3 had received no instruction from the defendant to check with Hexafuji nor did the defendant themselves make any attempt to verify or inquire from Hexafuji on the status of these 11 machines. I do not think that the defendant

had no duty at all to exercise reasonable care to ascertain the true owner in such circumstances before they decided to proceed with the auction. There is always a fundamental duty that no one should interfere with the right of property of the true owner. SP4, a director of Hexafuji at the material time, has now testified in dourt and confirmed that these 11 machines claimed by the plaintiff were owned by the plaintiff but leased to Hexafuji and these machiness were housed in Hexafuji's said rented premises among other machines. The fact that the said machines kept in the said premises were in the possession, custody and control of the defendant is an undisputed fact. Looking at all these evidence as a whole, I find that the defendant's defence relying on the mere fact that the plaintiff did not provide them with the serial number of the machines is not a good ground to defeat the plaintiff's claim for simple reason that the defendant themselves must be satisfied with the fact that the machines that they intended to auction off or interfered with were not the property of the actual or true owner, ie the plaintiff herein especially when sufficient notice having been given to them of the the plaintiff's claim. If they are in doubt and yet proceed to dispose of property belonging to others, there is no defence even if they were to plead innocence or good faith. In *Rimba Muda Timber Trading v Lim Kuoh Wee* [2006] 4 MLJ 505 (FC), His Lordship Arifin Zakaria FCJ (now CJM) in delivering the judgment of the Federal Court, has held, inter alia, very clearly that:

> …Held…
>
> (4) Therefore, whether the defendant acted with complete innocence or good faith would not afford a defence to a claim of conversion by the true owner of the goods or chattel. The common law has always leaned in favour of the true owner.

[16] At p 513, His Lordship has referred to a statement by Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd* at p 970 which explicitly spells out the duty of a defendant as follows:

> At common law, one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is an usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. The duty is absolute; he acts at his peril.

[17] In the instant case the defendant had vividly not even exercised any reasonable care to ensure and be satisfied that the said machines did not belong to the plaintiff before they proceeded with the auction in spite of the fact that the plaintiff had been asserting its claim over the machinery repetitively. Thus the defendant must have been well aware that they were not the owner of the said machinery and would have acted at their own peril if they were doubtful of

the ownership of the same. Even with the plaintiff's solicitor's presence on the auction date to inform that an interpleader proceeding had been filed and requested for the auction to be stopped, the defendant did not heed but proceeded on with the auction. Without any verification or confirmation from Hexafuji from which the defendant could have easily done so but failed to do, I do not find any valid defence when the defendant's intent to interfere with the plaintiff's right over the 11 units of machines was manifest and their act to commit conversion is deliberate. As the Federal Court in *Rimba Muda Timber Trading v Lim Kuok Wee* has also endorsed the principle of law that mistake or inadvertent is no defence to an action in conversion (Clerk & Lindsell, (18th Ed), at pp 153, paras 3–122), thus, once it is proved that the plaintiff is the owner of the 11 machines as claimed, I do not find that the defendant will have any defence to the plaintiff's case when there is no evidence that the plaintiff had ever given their actual permission or consent to the defendant to retain and/or dispose of their property through the auction. The defendant could have avoided this suit by deferring the auction of the 11 machines claimed by the plaintiff and waited for the disposal of the interpleader proceeding but they chose to act to their detriment.

[18] It is a fact that the auction or sale of the plaintiff's 11 units of machines was carried out by the bailiff of the sessions court. However, it was pursuant to the defendant's write of seizure and sale that the bailiff performed his duty. If the defendant had instructed to stop the auction on or before the date for the auction, the bailiff would have complied. In that sense, the defendant cannot shift their liability on to the bailiff. The duty is absolute on the defendant not to usurp the proprietary right of the plaintiff.

[19] On the evidence as a whole, I find that the plaintiff have proved their case of conversion by the defendant of the 11 units of machines as claimed on a balance of probabilities.

Fourth issue: Damages

[20] The plaintiff had led evidence through SP7, a registered valuer of Messrs Raine & Home International Zaki & Partners Sdn Bhd, who possesses a Bachelor degree in Business, Valuation and Land Economics from Australia and who has 17 years of experience in the valuation field to prove the market value of the 11 machines as at 5 August 2008 to be RM600,000 and the forced sale value to be RM400,000. This market value was arrived at taking into account of the fact that they were used equipment in their existing condition and state of repairs on 'as is where is' basis. In this valuation, SP7 was assisted by Miss Linda Goh, his plant and machinery engineer who holds a BSc Degree in Industrial Engineering, USA and a MIEM. The method of valuation adopted is the depreciated replacement cost method in which the value is arrived at by

A estimating the then new replacement cost of the machinery less the accrued depreciation for age and obsolescence. SP7's valuation report was produced as in bundle C pp 137–153. There is no evidence from the defendant as to the value of the 11 machines as they were at or about the material time to enable me to make a comparison. Although SP7 had been vehemently cross-examined, he B was nevertheless assertive of the valuation and did not sway to change the market value or forced sale value that they had arrived at. The sale value obtained through the auction conducted on 18 February 2008 was, according to SD1, RM160,000 (D13 Q & A.63). The defendant contended in submission that the evidence of SP7 is not expert opinion in conformity with C s 51 of the Evidence Act 1950 as it is bare expression which has no evidentiary value at all citing *Evidence Practice and Procedure* (3rd Ed), by Augustine Paul at p 561 which referred to the case of *Sim Ah Song v Rex* [1951] MLJ 150 151. It was further contended that since the report was prepared by Linda Goh, who D was not called to testify, the valuation report is hearsay.

[21] I shall first deal with the question of SP7's expertise. There is no dispute that he is a registered valuer, having the academic qualification of a Bachelor in Business, Valuation and Land Economics, Australia and having 17 years of E working experience; he is still practicing as registered valuer currently with Raine & Home International Zaki & Partners Sdn Bhd. Even Miss Linda Goh who assisted him is a qualified engineer holding BSc in Industrial Engineering, USA and a MIEM. Although learned counsel for the defendant had raised this F issue of SP7's expertise in submission, nevertheless, I find that no specific challenge was taken in cross-examination as to the expertise of SP7 in the field of plant and machinery valuation. It would not be a valid argument in submission only when the defence had not even put to SP7 in cross-examination that he is not an expert. Learned counsel for the defendant G seems to rely on the illustration in s 51 of the Evidence Act 1950 which provides that 'an expert may give an account of experiments performed by him for the purpose of forming his opinion'. However, the fact that SP7 has 17 years of experience as a registered valuer and had been conducting plant and machinery valuation which had not been shaken in cross-examination shows H that SP7 is qualified and a proper person to give his opinion on the valuation of the machinery. From his valuation report and his viva voce evidence in court including his witness statement marked as exh P12 in totality, I find that he had afforded explanation leading to his ultimate opinion on the market value and forced sale value particularly that he had considered and taken into account I among other factors the accrued depreciation for age and obsolescence of the machines which is one of the most pertinent factor in valuation, in SP7's method of valuation. Hence, I disagree with the defence's contention that his report or opinion is a bare assertion or expression. I do not find valid ground to reject SP7's evidence.

[22] There is no denial that the valuation report of SP7 was prepared by Miss Linda Goh and that she and others aiso assisted in the valuation work. However, the final approval of the valuation was by SP7 who is actual authority who signed on the report. Miss Linda Goh and the team who did the work were under SP7's instruction or supervision. Thus SP7 who authenticates the valuation report is the actual maker of the document; the mere deed of preparing the document or reducing certain details into writing does not ipso facto turn the writer into the maker of the document within the contemplation of the hearsay rule: per His Lordship Wan Yahya J in *Public Prosecutor v Abdul Rahim bin Abdul Satar* [1990] 3 MLJ 188; [1990] 3 CLJ (Rep) 1. I find that the hearsay rule does not apply and the valuation report vide bundle C pp 137–153 duly signed by SP7 and produced by him in court is not invalidated or affected by hearsay rule merely because Miss Linda Goh was the one who prepared it.

[23] Reverting to the measure of damages in relation to goods irreversibly converted, learned counsel for the plaintiff cited the Privy Council case of *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd and others* [1991] 2 All ER 129 where Lord Templeman in delivering the judgment of the council said at p 131:

> The general rule is that a plaintiff whose property is irreversibly converted has vested in him a right to damages for conversion measured by the value of the property at the date of conversion,

and at p 132, after the deliberating on the assessment of damages in an action for wrong detention by one man of property which belongs to another, that:

> A different consideration will apply when the property is irreversibly converted and the plaintiff loses that property. The plaintiff loses the value of the property at the date of conversion and the general rule is that the measure of damages is the value thus lost.

[24] In that case the Privy Council awarded 'damages for conversion equal to the market price, which was also the sale price'. The report of the same case also appears in [1990] 3 CLJ (Rep) 375. In *Clerk & Lindsell on Tort* (18th Ed), at p 776 at paras 14–104, the learned author stated:

> *How is the value assessed?* If there is a market price, the value of the goods is to be taken as the market price at the relevant time. If not, the value of the goods must be determined by any available evidence, such as the price at which the goods had been bought, or sold under a sub-contract …

[25] From the principles of law that can be discerned from English common law, the assessment of the value of the irreversibly converted property would generally be the market value at the relevant time of the conversion. From SP7's

said valuation report, the market value of the 11 machines claimed is RM600,000 as at 5 August 2008. The relevant date of the conversion is when the said machines were auctioned on 18 February 2008 which is about six months before the date of SP7's valuation report. However, since there is no issue taken on this variance of six months nor any evidence to indicate that the market value of the said machines would be different as at 5 August 2008 from the market value as at 18 February 2008, I am prepared to accept the probability or reasonable inference that there might be no vast disparity in the market value between these two dates. In addition, I have considered the method used by SP7 and his team in determining the market value of the 11 machinery as depicted in para 9.00 in his report at p 143 bundle C and the break down figure as in para 10.00 at p 144 of same bundle. The machinery were considered as used equipment in their existing condition and state of repairs on 'as is where is' basis. Depreciated replacement cost method of valuation was adopted for the assessment in that the value was arrived at by estimating the new replacement cost of the machinery then less the accrued depreciation for age and obsolescence. The intensity of the use of the plant and machinery, their condition then and the availability of spares/replacement and adaptability to modifications were the other factors considered in achieving the final market value. Although SP7 has stated in cross-examination that he only relied on the photographs of the machines to do the valuation as there was no longer available the physical machines as well as the lack of details of the machines such as the year made, the brand, the manufacturer, he had explained that he could evaluate the conditions of the machines from the photographs such as the electrical connection to the machines was still in place, the machine was still in its wrapping/not being used, the machine was still in position ie not having been dismantled. He also looked into the invoices, the direct import of the machines from Japan and had considered all available documents. I find SP7 had explained sufficiently what they had considered in arriving at the market value. Depreciation was certainly considered.

[26] I have also made a comparison of SP7's market value in his valuation report with the purchase price of the respective machinery as can be found in exh P4C and E and bundle of original documents marked exh P12 and found the market value arrived at by SP7 is practically lower than 50% of the actual purchase price, for example, in P4C, one unit of thread rolling machine costs RM43,000 and SP7's quoted market value is RM20,000 while one unit of vertical drilling machine costs RM8,000 vide P12 and the market value in SP7's report is RM3,500 and one unit of slotting machine which costs RM53,000 in P12 while SP7 gave its market value as RM22,000. However for the four Takisawa machines where the purchase price ranged from RM196,000 and RM210,000, the market price quoted by SP7 is RM135,000 which is approximately 30%–35% lower than the purchase price. In ordinary parlance, it is only logical to assume that used machinery could only be sold at a much lower price than the purchase price. Market value of used machinery in the

same sense must undoubtedly be much lower than the purchase price. I would say this is indeed a norm. Taking into consideration this factor, I find that SP7's quoted market value in his report is consistent and inconformity with this norm. I find no evidence to suggest that the said market value arrived at by SP7 is inflated or unreasonable as to give rise to any doubt as to its accuracy. When the defence alleged or contended that the market value arrived at by SP7 was inaccurate and/or excessive, they should have obtained a separate report or led evidence from another registered valuer or qualified person to say so. Without such evidence, the assertion by the defendant of inaccuracy and/or excessiveness of the market value arrived at by SP7 becomes bare and has no value. I therefore accept the market value of the 11 machines which amounts to the total of RM600,000 in even figure as stated by SP7 and his report in the absence of any evidence to the contrary.

[27] The plaintiff, in addition also claimed for general damages and/or exemplary damages for the conversion. I do not find that the plaintiff had proved such further claims. There is therefore no necessity to elaborate further in the absence of proper evidence being led to prove them. In *Williams v Peel River Land and Mineral Co Ltd* (1886) 55 LT 689 at p 693, Bowen LJ said, inter alia, that:

> … I cannot think that the law would really lay down anything so ridiculous as that a man should be compensated whether he suffered damages or not.

[28] Damages must be proved; see *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 21; *Emko Properties Sdn Bhd v Lee Choong Kheng* [1996] MLJU 515; [1997] 2 CLJ Supp 133 at 147. No award will be allowed for these damages which are not proved.

CONCLUSION

[29] Having considered all evidence and submissions by both parties herein, for the foregoing reasons and on a balance of probabilities, I hold that the plaintiff had proved that the defendant had wrongfully or irreversibly converted the 11 machines as claimed belonging to the plaintiff as well as the damages for conversion measured by the value of the said machines at or around the time of the conversion in the sum of RM600,000. Consequently, I allow the plaintiff's claim in the sum of RM600,000 with interest at the rate of 4% from the date of filing of this writ to the date of judgment and at the rate of 8% from the date of judgment to the date of realisation with costs of RM8,000.

Claim allowed with costs.

Reported by Ashok Kumar